MDM Declaration Exhibit A-16

1	UNITED STATES DISTRICT COURT
2	EASTERN DISTRICT OF NEW YORK
3	SUSANNA MIRKIN and BORIS MIRKIN,
4	Individually and on Behalf of All Others
5	Similarly Situated,
6	Plaintiffs,
7	vs. No. 18 Civ. 2949(ARR) (RER)
8	XOOM ENERGY, LLC and XOOM ENERGY
9	NEW YORK, LLC,
10	Defendants.
11	x
12	
13	
14	VIDEOTAPED DEPOSITION OF
15	SEABRON ADAMSON
16	Tuesday, November 8, 2022
17	10:06 a.m.
18	Veritext
19	101 Arch Street
20	Boston, Massachusetts 02110
21	
22	
23	
24	Laurie K. Langer, RPR
	Page 1
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1	APPEARANCES	1	PROCEEDINGS
2		2	
3	ON BEHALF OF THE PLAINTIFF(s):	3	VIDEOGRAPHER: Okay. We are on the record.
4	BY: Steven L. Wittels, Esq.	4	This is the videographer speaking Shawn Budd with
5	Ethan D. Roman, Esq. (appeared via Zoom.)	5	Veritext Legal Solutions. Today's date is November 8th,
6	Steven D. Cohen, Esq. (appeared via Zoom.)	6	2022 and the time is 10:06 a.m.
7	WITTELS MCINTURFF PALIKOVIC	7	We are here in Boston, Massachusetts to take
8	18 Half Mile Road	8	the video deposition of Seabron Adamson in the matter of
9	Armonk, New York 10504	9	Susanna Mirkin, et al, versus XOOM-Energy in New York,
10	(914) 319-9945	10	LLC.
11	slw@wittelslaw.com	11	Will counsel please introduce themselves for
12		12	the record.
13	ON BEHALF OF THE DEFENDANT(s):	13	MR. WITTELS: Steven Wittels. Wittels
14	BY: Michael D. "Matt" Matthews, Jr., Esq.	14	McInturff and Palikovic for the Plaintiffs and the
15	MCDOWELL HETHERINGTON LLP	15	proposed class on behalf of the witness today,
16	1001 Fannin Street, Suite 2700	16	Mr. Adamson.
17	Houston, Texas 77002	17	Appearing by video are also for the
18	(713) 337-5580	18	Plaintiffs in the proposed class Steven Cohen and Ethan
19	matt.matthews@mhllp.com	19	Roman.
20	materiate no e minp.com	20	MR. MATTHEWS: My name is Matt Matthews, I'm
21	ALSO PRESENT:	20	with the law firm of McDowell Hetherington and I
$\begin{vmatrix} 21\\22\end{vmatrix}$	David C. Coleman	21 22	_
23	Shawn Budd, Videographer		represent the Defendants XOOM Energy.
23	Shawh budu, videographei	23	Also with me here today is David Coleman of
24	Page 2	24	the NorthBridge Group who is, has been designated as a Page 4
	-		
1	INDEX OF EXAMINATION	1	testifying expert for XOOM.
2	W. W	2	VIDEOGRAPHER: The court reporter today is
3	WITNESS: Seabron Adamson	3	Laurie Langer. Will you please swear in the witness.
4	EXAMINATION PAGE NO.	4	
5	By Mr. Matthews 5	5	
6	By Mr. Wittels 138	6	SEABRON ADAMSON,
7		7	having been satisfactorily identified by the production
8	INDEX TO EXHIBITS	8	of his driver's license, and duly sworn by the Notary
9	NO. DESCRIPTION PAGE NO.	9	Public, was examined and testified as follows:
10	Exhibit 1 Expert Report of Derya 8	10	
11	Eryilmaz and Seabron Adamson	11	
12	Exhibit 2 Electricity Sales Agreement 12	12	EXAMINATION
13	Exhibit 3 Expert Report of David C. 47	13	
14	Coleman	14	BY MR. MATTHEWS:
15	Exhibit 4 Rebuttal Report of David C. 48	15	Q. Good morning, Mr. Adamson. How are you?
16	Coleman	16	A. Good morning.
17	Exhibit 5 First Amended Class Action 113	17	Q. Thank you for being here today. Before we jump
18	Complaint	18	in, I'll quickly go over ground rules. I know you've
19	Exhibit 6 Market Supply Cost Build Up 114	19	been deposed before,
20	11.7	20	A. Uh-huh.
21	(Original exhibits attached to original transcript)	21	Q I'm sure you're familiar with them. But this
22		22	is not meant to be any sort of endurance test, anytime
23		23	you need a break just let me know, we can take a break.
24		24	With, you know, the same qualification you always
	Page 3		Page 5
	<u> </u>		

Case 1:18-cv-02949-ARR-RER Document 145-18 Filed 05/05/23 Page 4 of 14 PageID #:

- agreements. If you want to take that to be liability,
- liability I guess is a legal term. But -- so I am
- addressing issues related to the consistency of the, the
- rates and the sales agreements. 4
- 5 Q. Okay. And whether or not XOOM breached those
- 6 provisions?
- 7 A. Well, I mean, again, "breach" seems a legal word.
- But whether it's -- whether the pricing was consistent
- with the, with the pricing required in the sales
- 10 agreements.
- Q. Okay. Is "breach" a word that you have 11
- 12 difficulty with?
- 13 A. No, I just.
- 14 Q. You've worked in a lot of --
- 15 A. Yeah.
- 16 Q. -- litigation for a long time.
- A. Sure. I just -- I don't know exactly what 17
- implications you're trying to put to that. I was just 18
- 19 trying to describe clearly what I did, which I think is
- 20 what's described here.
- 21 Q. I guess put differently, you are offering an
- 22 opinion about whether or not XOOM complied with the
- 23 pricing provisions of its sales agreement?
- A. Yes. 24

1 Q. Okay. So the third bullet point says that you

- have been asked, "to determine whether XOOM set its
- rates as required by the sales agreements."
- 4 Correct?
- 5 A. Yeah. The consistency, you know, the consistency
- 6 from an economic and commercial point between the rates
- 7 and, and, you know, how it -- how it -- how it
- 8 describes, I think, the phrase that we'll get, we'll get
- 9 around to today about the actual and estimated supply
- 10 costs --
- 11 Q. Yep.
- 12 A. -- in the -- in the sales agreement.
- 13 Q. Right. That's -- that's where I was going next.
- 14 The sales agreement requires that rates be set,
- 15 "based on XOOM's actual and estimated supply costs."
- 16
- 17 A. I don't have the phrasing in front of me, but
- 18 that sounds right.
- 19 Q. We can do that. I'm not trying to --
- 20 A. Yeah. I mean -- I think that's --
- 21 Q. Bear with me one second.
- 22 MR. MATTHEWS: May I mark this as Exhibit 2.
 - (Deposition Exhibit No. 2 marked for
- 24 identification.)

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Page 10

Page 12

- 1 Q. Okay. And so are you also offering an opinion
- about how the pricing terms of the sales agreements
- 3 should be interpreted?
- 4 A. No. I'm providing a -- my -- well, I'm providing
- my understanding of what it says and in the context of
- the, of electricity and gas markets and retail markets
- 7 and how that works out. Obviously, I'm not offering a
- 8 legal opinion on the language.
- 9 Q. Okay.
- 10 A. I'm offering my understanding based on knowledge
- 11 of these markets of how these, how these work.
- 12 Q. Okay. You're not offering a legal interpretation
- 13 of the pricing provisions in the XOOM sales agreement?
- 14 MR. WITTELS: Objection. I mean, I think he
- 15 asked -- he just answered it, didn't he?
- 16 MR. MATTHEWS: Steve, please, no speaking
- 17 objections today. Please.
- 18 MR. WITTELS: But it's the same question.
- 19 MR. MATTHEWS: "Objection form" is what's
- 20 appropriate to say, as you have reminded me. Okay?
- 21 A. I am not offering a legal opinion.
- 22 Q. Okay. Were you asked to assume a particular
- 23 interpretation of the pricing provisions?
- 24 A. No, not really. I mean, they're on the page.

- 1 Q. Okay. And, Mr. Adamson, does this appear to be a
- copy of the sales agreement you were referring to?
- 3 A. Yes, I think so. I mean, there were
- 4 various, obviously various versions of these over time,
- 5 but this looks like the one.
- 6 Q. This is the one that you analyzed --
 - A. Yes, I believe --
- 8 Q. -- in connection with preparing this report?
- 9 A. Yes, I believe so.
- Q. Okay. And in connection with the assignment to 10
- determine whether XOOM set its rates as required by the 11
- 12 sales agreements, can you direct me to the provisions
- 13 that you looked at that relate to rate setting?
- A. I mean, you know, obviously the -- the -- the 14
- primary one is in this top right box, starting "your 15
- 16 rate."
- 17 Q. "Your rate for energy purchases will be a
- 18 variable rate, per kilowatt hour, that may change on a
- 19 monthly basis, plus taxes and fees, if applicable. Your
- 20 monthly variable rate is based on XOOM's actual and
- 21 estimated supply costs which may include but not be limited to prior period adjustments, inventory and
- 23 balancing costs. You are responsible for all charges
- assessed and billed by your local utility for all

Page 13

Page 11

1		1	L
1	Q. In doing that rate conversion, do you interpret that provision to mean that XOOM may include a margin it	1	has.
2	its rate?	_	So I would, you know I imagine that that was, imagined that that was going to come up. I think I
3		3	mean, whether, to the extent non supply costs margins
4	MR. WITTELS: Objection. A. I don't see that listed here. You know, it says,	5	are included really is something that the judge or the
5			
6	"actual and estimated supply costs." I don't see that	6	jury or whoever decides on this has to, has to opine on.
7	here. Sort of as we said, I anticipated that was going	7	Q. Okay. Because you're not offering a legal
8	to be kind of argued. I mean, when you have the reading	8	interpretation?
9	here, I don't see that. It says, "actual and estimated	9	A. I am not offering a legal interpretation.
10	supply costs," it doesn't talk about margin. I mean, so	10	Q. Okay. If I said that I interpret that phrase
11	I think the most straightforward reading of that is it	11	based on actual and estimated supply costs to mean that
12	doesn't have margin in it.	12	XOOM's rate will rise and fall with its supply costs,
13	Q. In your opinion XOOM may not include a margin in	13	would you agree with that or disagree?
14	its rate based on that contract provision?	14	MR. WITTELS: Objection. By the way, when
15	A. I would say it's actual I mean, if they	15	you say "you," you the lawyer? I don't know what you
16	if it just needs to it needs to be to actual and	16	mean.
17	estimated supply costs. Which does not list here	17	A. Sorry. Can you repeat the question.
18	"margin."	18	Q. I say that when I, Matt.
19	Q. Mr. Adamson, I'll stipulate that the word	19	A. Right. Okay. We get our pronouns right. Yeah.
20	"margin" is not in that provision.	20	Okay.
21	A. Yes.	21	Q. Read that pricing provision, specifically the
22	Q. You don't have to tell me that again.	22	phrase "based on XOOM's actual and estimated supply
23	A. Okay.	23	costs," I think that means that XOOM's rates will rise
24	Q. I want to know, your interpretation is. You're Page 30	24	and fall with its supply costs. Would you agree with
	rage 50		Page 32
1	offering an opinion of what this provision means; yes?	1	that madding on discourse?
		1	that reading or disagree?
2	A. Yeah, I'm offering what I think is a, you know, a	2	A. I think that is if the rate is determined from
3	A. Yeah, I'm offering what I think is a, you know, a relatively commonsensical commercial one. I'm my	2 3	A. I think that is if the rate is determined from actual and estimated supply costs then that is likely to
2 3 4	A. Yeah, I'm offering what I think is a, you know, a relatively commonsensical commercial one. I'm my my ordinary reading of this is, you know, deal with	2 3 4	A. I think that is if the rate is determined from actual and estimated supply costs then that is likely to be true, but that doesn't seem to be sufficient to me to
2 3 4 5	A. Yeah, I'm offering what I think is a, you know, a relatively commonsensical commercial one. I'm my my ordinary reading of this is, you know, deal with supply costs and, and that's what it says.	2 3 4 5	A. I think that is if the rate is determined from actual and estimated supply costs then that is likely to be true, but that doesn't seem to be sufficient to me to meet the requirement.
2 3 4 5 6	A. Yeah, I'm offering what I think is a, you know, a relatively commonsensical commercial one. I'm my my ordinary reading of this is, you know, deal with supply costs and, and that's what it says. Q. And does it mean that XOOM may include a margin	2 3 4 5 6	A. I think that is if the rate is determined from actual and estimated supply costs then that is likely to be true, but that doesn't seem to be sufficient to me to meet the requirement. Q. What else would be required?
2 3 4 5 6 7	A. Yeah, I'm offering what I think is a, you know, a relatively commonsensical commercial one. I'm my my ordinary reading of this is, you know, deal with supply costs and, and that's what it says. Q. And does it mean that XOOM may include a margin on top of those supply costs?	2 3 4 5 6 7	A. I think that is if the rate is determined from actual and estimated supply costs then that is likely to be true, but that doesn't seem to be sufficient to me to meet the requirement. Q. What else would be required? A. Well, again, as I as we tried to explain in
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2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17	A. Yeah, I'm offering what I think is a, you know, a relatively commonsensical commercial one. I'm my my ordinary reading of this is, you know, deal with supply costs and, and that's what it says. Q. And does it mean that XOOM may include a margin on top of those supply costs? MR. WITTELS: Objection. A. They my kind of ordinary read of that is it doesn't say that, unless, unless they are it's not included in supply costs, it doesn't list that. And it's not a, you know, direct actual supply cost. That's what it says. So I think the answer to your question is no. Q. Okay. A. If you were to say it does, okay, that's different. That's a different view of the same thing.	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17	A. I think that is if the rate is determined from actual and estimated supply costs then that is likely to be true, but that doesn't seem to be sufficient to me to meet the requirement. Q. What else would be required? A. Well, again, as I as we tried to explain in that rebuttal report, moving together is a very weak measure of anything; right? So the real question is not, not just do things move together, but, I mean, obviously there are other elements of a mathematical relationship between moving together. I don't think moving together is sufficient to determine whether that's, quote, based on. Q. So if it's not just that it moves together, A. Uh-huh. Q what else is required?
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1	opinion.	1	A. And then there was testimony as I note in
2	MR. WITTELS: But usually if you're making a	2	paragraph 54 about potential kind of makeup losses,
3	statement you're taking it from there.	3	which I guess you could consider some kind of prior
4	MR. MATTHEWS: Well, thank you for that	4	period adjustment. But in with an unrelated market
5	guidance. I'm learning a lot.	5	not related to New York. So there's testimony
6	A. Well, I think it's probably around page	6	that there's general testimony and then there's
7	Q. I'll find it for you. How about paragraph 23B	7	specific testimony.
8	and 54.	8	Q. About consideration of prior period adjustments?
9	A. 54. Right. Okay. Yes. Okay. Sorry, can you	9	A. Yes.
10	repeat your question.	10	Q. Okay. Got it. We're on the same page.
11	Q. Please, if you would, so we don't have any	11	A. Okay.
12	confusion, if you would read both of those paragraphs.	12	Q. The period of time
13	And then I'll	13	A. Uh-huh.
14	MR. WITTELS: Into the record,	14	Q that you looked at for rate setting
15	Q proceed.	15	procedures
16	MR. WITTELS: or?	16	A. Uh-huh.
17	MR. MATTHEWS: No. No. Just to himself.	17	Q goes from 2013 to 2021; right?
18	A. (Witness reviewing.) Okay.	18	A. Yes. Broadly, yes.
19	Q. Okay. What you, generally speaking, opine	19	Q. Broadly?
20	with reference to those prior period adjustments that	20	A. Yeah.
21	you were unable to substantiate whether XOOM considere	d21	Q. Did you do any analysis of what other ESCOs
22	them in setting its rates; is that a fair statement?	22	charged in New York during that same time period?
23	A. Yeah. I mean, we looked at the information in	23	A. No.
24	the rate setting workbooks, which was very extensive.	24	Q. Okay. So you don't know how XOOM's rates
	Page 62		Page 64
l .			
1	There didn't seem to be any determination, calculation,	1	compared to other ESCOs rates?
1 2	There didn't seem to be any determination, calculation, amounts or anything associated with prior period	1 2	compared to other ESCOs rates? A. For purposes of this we never made a comparison.
	The state of the s		
2	amounts or anything associated with prior period	2	A. For purposes of this we never made a comparison.
2 3	amounts or anything associated with prior period adjustments as expected. I'm I was really kind of	2 3	A. For purposes of this we never made a comparison. Q. And you don't know if XOOM's rates were outside
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1	which is I think what you're doing. But I think you	1	A. The between total cost and the rate.
2	understand what we did.	2	Q. Okay. Which is the margin?
3	Q. I am, because I'm focusing in my question, I have	3	MR. WITTELS: Object.
4	built this in on your damage calculation. So I	4	A. The rate is not the margin.
5	understand your position about bullet 3, let's call it.	5	Q. No, I know.
6	Which is your opinions about whether or not XOOM's rate	6	A. A rate is not a margin.
7	setting was consistent or not, with the sale agreement.	7	Q. The delta is. The delta is.
8	But I'm talking about with respect to 4, after	8	A. Okay. We can call that a margin, yes.
9	you concluded	9	Q. The delta between the total costs
10	A. Uh-huh.	10	A. Right.
11	Q the rate was not consistent	11	Q and the rate is
12	A. Right.	12	A. Right.
13	Q that your damage model	13	Q the margin; right?
14	A. Right.	14	A. That that you can characterize that as a
15	Q and what they considered relevant was the	15	margin.
16	amount of gross margin that XOOM put on top of its	16	Q. Well, what would you characterize it?
17	supply cost?	17	A. I would just characterize it as a difference, as
18	A. Are we discussing the Method 1 model or the	18	a delta.
19	Method 2 model?	19	Q. Okay. You're not offering an opinion in this
20	Q. Well, it's both; right?	20	case that under the sales agreement XOOM could not
21	A. Well, it's	21	charge more than the regulated utilities rate; right?
22	Q. Let's start with Method 1.	22	A. No. I mean, the comparison I made was between
23	A. Okay. Right.	23	supply costs and the rate under this contract.
24	Q. Right. Method 1, what was relevant was the	24	Q. Right. And you're not offering a damage model
	Page 66		Page 68
1	amount of gross margin that's input on top of its supply	1	that compares XOOM's variable rate charges to what
$\begin{bmatrix} 1 \\ 2 \end{bmatrix}$	amount of gross margin that's input on top of its supply costs: right?	1 2	that compares XOOM's variable rate charges to what customers would have been charged by the utility during
2	costs; right?	2	customers would have been charged by the utility during
2 3	costs; right? MR. WITTELS: Objection.	2	customers would have been charged by the utility during the same time period?
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1	customers as a proxy of a rate that XOOM itself had	1	Q. And if he said, "but can you give me a cutoff
2	used. I can't go further than that because there's no	2	point? Is there a number that you can assign to that?"
3	information.	3	Would you be able to give him one?
4	MR. MATTHEWS: Can you read my question	4	MR. WITTELS: Objection.
5	back, please.	5	A. I wouldn't be able to give him a number on the
6	(Prior testimony read back.)	6	stand because I wouldn't have the, XOOM's internal
7	"Are you offering an opinion	7	information, no.
8	about what is a reasonable or	8	Q. Okay. So the margin in your view,
9	appropriate margin for an ESCO	9	A. Uh-huh.
10	to charge?"	10	Q the margin that is appropriate for an ESCO to
11	A. Yeah. Conceptually, yes. Conceptually, yes.	11	charge conceptually
12	Thanks for reading that back.	12	A. Uh-huh.
13	Q. That's okay. And what is the opinion that you're	13	Q is ESCO specific?
14	offering conceptually about that?	14	A. Well, again, we're talking about relation to a
15	A. Well, I mean, it's obviously related to the	15	specific contract, so.
16	contract that we've been discussing, whether it's based	16	Q. I'm not.
17	on supply costs, that, you know, if the Court were to	17	A. You're not.
18	decide that a margin was allowed, that it can't be an	18	MR. WITTELS: Don't interrupt him.
19	uncapped margin, that's why we made a second calculation	l	A. I am talking sorry. I'm talking about this
20	using the fixed rate margin as a proxy of what might be	20	specific contract. Other ESCOs may have, and I'm sure
21	an acceptable margin.	21	do, very different contractual forms. And in fact,
22	Q. Are you offering any opinion about what is an	22	ESCOs even the same ESCO will have lots, may have
23	acceptable or appropriate, a reasonable margin aside	23	different pricing, right, under different arrangements.
24	from just using XOOM's fixed rate margin?	24	We're talking about variable rate pricing here as
	Page 70		Page 72
1	A We haven't offered that opinion, we don't have	1	opposed to fixed rate pricing
1	A. We haven't offered that opinion, we don't have	1 2	opposed to fixed rate pricing.
2	any information to do that.	2	Q. Uh-huh.
2	any information to do that. Q. Do you intend to?	2 3	Q. Uh-huh.A. Fixed rate pricing, I think we can all agree, the
2 3 4	any information to do that.Q. Do you intend to?A. If information were to be provided, but that	2 3 4	Q. Uh-huh.A. Fixed rate pricing, I think we can all agree, the actual outturn margins could be quite different. A lot
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3 A. Deregulated in some sense. I mean— 4 Q. Right. 5 A retail electricity rates are not completely— 5 they're still subject to regulation. 7 Q. Agreed. 8 A. Right. 9 Q. But - but a competitive rate is what an ESCO is allowed to charge as opposed to a rate set by a regulator;— 12 MR. WITTELS: Objection. 13 Q right? 14 MR. WITTELS: Objection. 15 A. Well, I think you would need to be precise about the statement. The that would depend on the what and the statement. The that would depend on the what and the statement. The that would depend on the what and the statement. The that would depend on the what and the statement. The that would depend on the what and the statement. The that would depend on the what and the statement. The that would depend on the what and the wind the statement. The that would depend on the what and the wind the statement. The that would depend on the what and the statement. The that would depend on the what and the statement. The that would depend on the what and the statement. The that would depend on the what and the statement. The that would depend on the what and the statement. The that would depend on the what and the for profit business operating in a competitive market? 20 MR. WITTELS: Objection. 21 A. XOOM is definitely a for profit business. I mean, it's not subject to perfect competition in an cannot contract. That's why I under Model I? 21 characterizing it, I agree with you in in in casual terms. 22 Q. Okay. But we can agree at least that XOOM is a definitely a for profit business. I was a formal account and the interest and the inear the interest and the interest and the interest and the intere	1	Q. And they operate in a deregulated competitive	1	costs, that's what we use for Model 1. That's what
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already discussed around the reading of supply costs, 23 your opinion. Right?	23	already discussed around the reading of supply costs,	23	your opinion. Right?
24 and as you said, you know, supply costs it's total 24 A. I know my opinion.	24	and as you said, you know, supply costs it's total	24	A. I know my opinion.
				Page 85

1	Q. And so I'm not at this point even arguing with	1	this information back that we made the calculation on
2	you about it. I just want to understand it.	2	around their costs.
3	A. Uh-huh.	3	Q. Let me see if I can go at it a different way.
4	Q. You've said that under Model 1	4	Model 1 in your opinion accurately measures the
5	A. Right.	5	damages
6	Q anything above,	6	A. Uh-huh.
7	A. Uh-huh.	7	Q flowing from what you believe is XOOM's
8	Q anything charged by XOOM above the supply	8	failure to set variable rates consistent with the
9	costs reported in the rate setting workbook is a damage;	9	contract language?
10	right?	10	A. Yes.
11	A. Yes.	11	Q. And let's see. Paragraph 72 to your report.
12	Q. And that under that model	12	A. Just give me one second to flip to the page.
13	A. Uh-huh.	13	MR. WITTELS: 72?
14	Q for those customers who were charged variable	14	A. Uh-huh. Okay.
15	rates by XOOM over the relative time period, XOOM would	15	Q. Calculates the difference between XOOM's reported
16	lose money	16	supply costs and the rate that the regulated utility
17	MR. WITTELS: Objection.	17	charged; correct?
18	Q for those customers in that contract language?	18	A. No. I don't think you said that right.
19	MR. WITTELS: Asked and answered.	19	Q. Okay. What what does that calculate in
20	Objection.	20	paragraph 72?
21	A. Possibly. I don't think that's the question in	21	A. Well, the second sentence talks about XOOM's
22	front of us. As I said, I mean, the question is	22	total costs and the thing we just discussed; right?
23	consistency with the contractual language.	23	As we as I indicate here we also did a, you
24	Q. Right.	24	know, just a kind of a crosscheck calculation to see if
	Page 86		Page 88
1	A. You said as you said yourself, they provided	1	it's in the same, you know, in the same order of
2	their supply costs. What's the difference with supply	1 2	magnitude and just crosschecked it again to what XOOM
			magnitude and just crosschecked it again to what XOOM had reported the applicable utility rates to be. You
2	their supply costs. What's the difference with supply costs? Q. I I don't know why this is difficult. Like,	2	magnitude and just crosschecked it again to what XOOM had reported the applicable utility rates to be. You know, they're generally similar. So if you were to take
3	their supply costs. What's the difference with supply costs? Q. I I don't know why this is difficult. Like, the calculation isn't even difficult. I'm bad at math	2 3	magnitude and just crosschecked it again to what XOOM had reported the applicable utility rates to be. You know, they're generally similar. So if you were to take the deltas, not against XOOM's total cost but against
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2 3 4 5	their supply costs. What's the difference with supply costs? Q. I I don't know why this is difficult. Like, the calculation isn't even difficult. I'm bad at math	2 3 4 5	magnitude and just crosschecked it again to what XOOM had reported the applicable utility rates to be. You know, they're generally similar. So if you were to take the deltas, not against XOOM's total cost but against
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A. Well, in a sense, yes, because the, you that might be a thing. But we -- we haven't seen that know -- well, first off, the fix rate is used as, you here. It was asked, but we haven't seen it. know, a way of coming up with a reasonable margin that, O. Who asked? 3 based on what XOOM itself set rates on. You know, it's 4 A. Well, the discovery request asked for costs and 5 not -- it's based on the information available. pricing methodologies and stuff. 6 So one question then comes to, you know, are, is 6 Q. Paragraph 75. It says -- this is towards the 7 there some reason that, that XOOM would need to charge a 7 bottom, I suppose it's the last sentence. 8 higher rate on fixed rate customers? If so I don't 8 "It appears that XOOM was able to operate and 9 really see what it is. make a reasonable profit selling fixed rate contracts 10 MR. WITTELS: Variable. 10 with substantially lower margins than variable 11 A. Sorry. On variable rate customers. I am -- we contracts, and yet arbitrarily imposed much higher 11 12 don't have any information to, to delve into that. 12 margins on their variable rate customers?" 13 Q. I'm asking conceptually. And it's okay if you 13 Do you see that? 14 are not offering this opinion. I'm not saying you 14 A. Yes. 15 should or you shouldn't be. I just want to know in this 15 Q. Where does it appear that XOOM was able to case are you going to offer an opinion that it is not 16 operate and make a reasonable profit selling fixed rate fair for XOOM to seek a higher margin on variable rates contracts with substantially lower margins? 17 18 conceptually than it does on fixed rates? 18 A. Well, the margins you can kind of see in the 19 A. In this context, yes. Because there is no XOOM 19 table, the average margins over years. As I say, it 20 provided despite all of the information about how those 20 appears that they chose to offer those fixed rate 21 methods were set of how these margins came up. How 21 margins over a considerable period of time. 22 these -- how the variable rate margins were determined 22 Q. Uh-huh. 23 A. So they would have had -- XOOM would have had the and that's a reasonable proxy, yes. 23 24 Q. Are you offering that opinion more broadly, that opportunity to offer if it was saying, "oh, my God, Page 100 in all circumstances -- and I'm asking this, to give you we're losing tons of money on all of our variable customers -- I mean, our fixed rate plans that could some prospective on why I'm asking, because you've done 2 it in two cases now that I know of, set the fixed rate 3 have been adjusted." 4 margin as a benchmark. 4 But we don't -- as I mentioned before we don't have contract by contract P & Ls, for example. 5 5 A. Uh-huh. 6 Q. So are you going to offer the opinion that in the 6 Q. Right. So I think we're saying the same thing. 7 ESCO world --7 Your table 1 reflects gross margin for fixed rate 8 8 customers; right? A. Uh-huh. 9 9 A. Yes. Q. -- it is not appropriate for an ESCO to seek a higher margin for variable rates than it does for fixed 10 Q. Okay. 11 A. I think so, yes. rates? 11 12 MR. WITTELS: Objection. 12 Q. But you don't know whether --13 A. I mean, to me the rates have to be set for the 13 VIDEOGRAPHER: I'm sorry. I didn't hear contract. The -- the use of fixed rates seemed 14 that. You're hitting the microphone. 15 appropriate for coming up with the reasonable proxy 15 A. Oh, I'm sorry. 16 given that, you know, the, the risks associated with the 16 VIDEOGRAPHER: Bring it up a little higher. 17 variable rates in general would be similar or probably 17 A. How is that? Is that better? VIDEOGRAPHER: Great. Thank you. 18 18 lower. If you say that there are other fixed costs it's 19 hard to see why they are different. We never saw 19 A. Okay. Thank you. Sorry. 20 anything in this case saying, demonstrating why there 20 Q. That's okay. But you don't know if XOOM actually 21 21 made a net profit on those same customers? would be a difference between the two. If someone could 22 present, you know, compelling economic evidence that 22 A. No, we don't have -- we don't have customer 23 23 says, "by God, I can prove to you that the costs of segment level profit and loss data. variable rate is completely different than fixed rate" 24 Q. Okay. In the -- circling back to the Richards

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1	case real quick. In that case you were not offering a	1	charges are also discussed at the rate setting
2	legal interpretation of what the contract language	2	Q. Okay.
3	meant; right?	3	A thing, just if you read the last sentence. I
4	A. No, I would not have offered a legal	4	think what I was pointing to, just to cut the was
5	interpretation.	5	there were things that came up was, it's under the title
6	Q. And your interpretation of XOOM's contract	6	thing. And it says, "delivered to a location considered
7	language here is similarly constrained. You in the	7	the point of delivery," you know, I was just commenting
8	sense that you are not offering a legal interpretation	8	that point of delivery obviously depends for a customer,
9	here, either?	9	depending on what utility serves them in the state.
10	MR. WITTELS: Objection.	10	Q. Okay. Got it. Do you see the provision right
11	Q. Right?	11	above that, the agency provision?
12	A. Yeah, I'm not offering a legal opinion, I think	12	A. Uh-huh.
13	as we discussed, yes.	13	Q. Do you see the last sentence of that section,
14	Q. Not to any greater degree than you did in the	14	"these services are provided on an arm's length basis
15	Richards case?	15	and market-based compensation is included in the price
16	A. No. Just not offering a legal opinion.	16	noted above."
17	Q. Okay. Look if you would at Exhibit 2, which is	17	Did I read that correctly?
18	the sales agreement.	18	A. Yes.
19	A. Yep.	19	Q. What does that sentence mean to you?
20	Q. And you directed me to we talked about the	20	A. "These services are provided on an arm's length
21	key, the critical	21	basis and market-based compensation is included in the
22	A. Uh-huh.	22	price noted above." Well, where it says they have
23	Q rate setting provision earlier. And then you	23	energy, they have transportation, those of the LDU, the
24	directed me to a couple of others that you looked at,	24	transmission facilities and LDU have compensation that's
	Page 102		Page 104
		l _	
1	one being the price section.	1	market based.
1 2	one being the price section. A. Uh-huh.	1 2	market based. Q. Okay. Do do you have any opinion about what
2	A. Uh-huh.	2	Q. Okay. Do do you have any opinion about what
2 3	A. Uh-huh.Q. Do you remember that?A. Yes.	2	Q. Okay. Do do you have any opinion about what the price noted above refers to?A. In the in the price noted above and the price
2 3 4	A. Uh-huh.Q. Do you remember that?	2 3 4	Q. Okay. Do do you have any opinion about what the price noted above refers to?A. In the in the price noted above and the price related to the arranging for and contracting
2 3 4 5	A. Uh-huh.Q. Do you remember that?A. Yes.Q. And then I'm not sure where it appears, but you also pointed me to a provision about delivery	2 3 4 5	Q. Okay. Do do you have any opinion about what the price noted above refers to? A. In the in the price noted above and the price related to the arranging for and contracting transportation, that's one possibility. No, I don't
2 3 4 5 6	A. Uh-huh.Q. Do you remember that?A. Yes.Q. And then I'm not sure where it appears, but	2 3 4 5 6	Q. Okay. Do do you have any opinion about what the price noted above refers to?A. In the in the price noted above and the price related to the arranging for and contracting
2 3 4 5 6 7	 A. Uh-huh. Q. Do you remember that? A. Yes. Q. And then I'm not sure where it appears, but you also pointed me to a provision about delivery charges; do you remember that? MR. WITTELS: What what's the question 	2 3 4 5 6 7	Q. Okay. Do do you have any opinion about what the price noted above refers to? A. In the in the price noted above and the price related to the arranging for and contracting transportation, that's one possibility. No, I don't have an express opinion about that. Q. Okay. Fair enough. So this agency section in
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2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19	A. Uh-huh. Q. Do you remember that? A. Yes. Q. And then I'm not sure where it appears, but you also pointed me to a provision about delivery charges; do you remember that? MR. WITTELS: What what's the question here that you're asking him, Matt? I mean, what are you asking? A. Sorry. Can you repeat. Q. So you when I asked you earlier about your interpretation of this contract, or your review of it, A. Uh-huh. Q let's say, you you mentioned the rate setting provision that's at the top of the table; yes? A. Uh-huh. Yes. Q. And you mentioned the price section at the bottom	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18	Q. Okay. Do do you have any opinion about what the price noted above refers to? A. In the in the price noted above and the price related to the arranging for and contracting transportation, that's one possibility. No, I don't have an express opinion about that. Q. Okay. Fair enough. So this agency section in that sentence specifically are not something that you considered in connection with your evaluation of whether or not XOOM set its rates consistent with the terms of the sales agreement? A. No. This seems to be referencing to you they're specifically allowed to buy the energy and arrange it through the transmission and LDU systems. Q. Okay. So it was A. Which is not which is not, I don't think, very controversial. Q. So that that market-based compensation was not
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20	A. Uh-huh. Q. Do you remember that? A. Yes. Q. And then I'm not sure where it appears, but you also pointed me to a provision about delivery charges; do you remember that? MR. WITTELS: What what's the question here that you're asking him, Matt? I mean, what are you asking? A. Sorry. Can you repeat. Q. So you when I asked you earlier about your interpretation of this contract, or your review of it, A. Uh-huh. Q let's say, you you mentioned the rate setting provision that's at the top of the table; yes? A. Uh-huh. Yes. Q. And you mentioned the price section at the bottom of page 1; yes?	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20	Q. Okay. Do do you have any opinion about what the price noted above refers to? A. In the in the price noted above and the price related to the arranging for and contracting transportation, that's one possibility. No, I don't have an express opinion about that. Q. Okay. Fair enough. So this agency section in that sentence specifically are not something that you considered in connection with your evaluation of whether or not XOOM set its rates consistent with the terms of the sales agreement? A. No. This seems to be referencing to you they're specifically allowed to buy the energy and arrange it through the transmission and LDU systems. Q. Okay. So it was A. Which is not which is not, I don't think, very controversial. Q. So that that market-based compensation was not factored into your damage calculations either; right?
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2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	A. Uh-huh. Q. Do you remember that? A. Yes. Q. And then I'm not sure where it appears, but you also pointed me to a provision about delivery charges; do you remember that? MR. WITTELS: What what's the question here that you're asking him, Matt? I mean, what are you asking? A. Sorry. Can you repeat. Q. So you when I asked you earlier about your interpretation of this contract, or your review of it, A. Uh-huh. Q let's say, you you mentioned the rate setting provision that's at the top of the table; yes? A. Uh-huh. Yes. Q. And you mentioned the price section at the bottom of page 1; yes? A. Yes. Q. And then you also mentioned some provision	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	Q. Okay. Do do you have any opinion about what the price noted above refers to? A. In the in the price noted above and the price related to the arranging for and contracting transportation, that's one possibility. No, I don't have an express opinion about that. Q. Okay. Fair enough. So this agency section in that sentence specifically are not something that you considered in connection with your evaluation of whether or not XOOM set its rates consistent with the terms of the sales agreement? A. No. This seems to be referencing to you they're specifically allowed to buy the energy and arrange it through the transmission and LDU systems. Q. Okay. So it was A. Which is not which is not, I don't think, very controversial. Q. So that that market-based compensation was not factored into your damage calculations either; right? A. No, because I focused on supply costs. This I kind of take as being, these services are provided on an

1	their retail business.	1	XOOM or some broad question.
2	Q. Okay. Well, I guess	2	Q. And the answer was?
3	A. For example, a bunch of the Texas companies have	3	A. I believe he said yes, they were, they were both
4	retail supply businesses. We did a little bit on that,	4	profitable. Both fixed rate and variable rate were
5	but not a major thing. But a bunch of the Texas	5	profitable.
6	companies had retail supply businesses that also had	6	Q. Okay. I have no further questions at this time.
7	substantial other businesses.	7	Thanks.
8	Q. I think I understand what you're saying. And you	8	MR. MATTHEWS: Thanks very much.
9	didn't work for the retail side of their businesses, you	9	A. Thank you.
10	worked for the other side of their businesses?	10	VIDEOGRAPHER: The time is 2:39, we are off
11	A. Or sometimes we would be hired on some kind of	11	the record.
12	corporate strategy type engagement, which might be	12	COURT REPORTER: And, Mr. Matthews, your
13	pretty broad.	13	order?
14	Q. Got it. Okay. I thank you for your time and	14	MR. MATTHEWS: My order is an expedited
15	your patience with me.	15	transcript, just, I don't need any print copies.
16	MR. MATTHEWS: I'll pass the witness.	16	Electronic only. PDF exhibits.
17	A. Thank you.	17	COURT REPORTER: Expedite by Friday?
18	Q. Yes, sir.	18	MR. MATTHEWS: Yes.
19	Ç. 223, 323	19	(Whereupon, the deposition concluded at
20	EXAMINATION	20	approximately 2:39 p.m.)
21		21	approximately 2.55 p.m.)
22	BY MR. WITTELS:	22	
23	Q. Mr. Adamson, I just really have one question for	23	
24	you. You were asked by counsel for XOOM about whether		
-	Page 138		Page 140
1	the company was able to make any profits on its fixed	1	CERTIFICATE
2	rate customers; do you remember that question?	2	
3	A. Yeah. Not in exact wording, but I remember the	3 4	COMMONWEALTH OF MASSACHUSETTS SUFFOLK, ss.
4	question.	5	SCITOLIK, SS.
5	Q. Yeah. And did you ask me to, whether you could	6	I, Laurie Langer, Registered Professional Reporter
6	go back and review your report when we had a break?	7	and Notary Public in and for the Commonwealth of Massachusetts, do hereby certify that the witness whose
7	A. Yeah, well yes, we were discussing the report.	'	deposition is hereinbefore set forth, was duly sworn by
8	Q. And did you reread paragraph 57?	8	me and that such deposition is a true record of the
9	A. Yes.		testimony given by the witness.
10	Q. And does that answer the question of whether XOON	9 110	
11	made money and was profitable on its fixed rate		I further certify that I am neither related to or
12	customers?	11	employed by any of the parties in or counsel to this
13	MR. MATTHEWS: Objection. Leading.	12	action, nor am I financially interested in the outcome of this action.
14	A. Well, I just it just reminded me there was	13	or ans action.
15	a I had said that there was not a specific P&L, this		In witness whereof, I have hereunto set my hand and
16	was a reference in the report to deposition testimony	14	seal this 11th day of November, 2022.
17	from a XOOM witness about the profitability of this.	15 16	
18	Q. And what did your report find and state?	17	Nam May
19	A. I don't remember exactly how he worded it. I	18	NUIAKI PUDLIC
20	think there had been a, in the deposition there was a	10	Commission Expires
21	question about, it was around, I don't have the	19 20	7/27/2023
22	transcript in front of me, of course, of the deposition,	21	
23	but it was something around the line of were were a	22	
24	fixed rate were fixed rate customers profitable for	23 24	
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1			

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1	DEPOSITION ERRATA SHEET		Steven L. Wittels, Esq.
2		2	slw@wittelslaw.com
3	Our Assignment No: 5544017	3	November 11, 2022
4	Case Caption: Mirkin vs. XOOM Energy	4	RE: Mirkin, Susanna Et. Al. v. XOOM Energy, LLC And XOOM
5			Energy New York, LLC
6	DECLARATION UNDER PENALTY OF PERJURY	5	11/8/2022, Seabron Adamson (#5544017)
7	I declare under penalty of perjury that I have	6	The above-referenced transcript is available for
8	read the entire transcript of my Deposition taken in the	7	
9	captioned matter or the same has been read to me, and	8 9	Within the applicable timeframe, the witness should
10	the same is true and accurate, save and except for	10	read the testimony to verify its accuracy. If there are any changes, the witness should note those with the
11	changes and/or corrections, if any, as indicated by me	11	reason, on the attached Errata Sheet.
12	on the DEPOSITION ERRATA SHEET hereof, with the	12	The witness should sign the Acknowledgment of
13	understanding that I offer these changes as if still	13	Deponent and Errata and return to the deposing attorney.
14	under oath.	14	Copies should be sent to all counsel, and to Veritext at
	Signed on theday of2022	15	errata-tx@veritext.com.
15	Signed on theday of2022	16	STAIL LICE FOR CALLED
16		17	Return completed errata within 30 days from
17		18	receipt of testimony.
18	SEABRON ADAMSON	19	If the witness fails to do so within the time
19		20	allotted, the transcript may be used as if signed.
20		21	
21		22	Yours,
22		23	Veritext Legal Solutions
23		24	
24	Job No. HOU5544017	25	
	Page 142		Page 144
1	DEPOSITION ERRATA SHEET		
	Job No. HOU5544017		
2	Page No Line No Change to:		
3			
4	Reason for change:		
5	Page No Line No Change to:		
6			
7	Reason for change:		
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22	Reason for change:		
23	SIGNATURE: DATE:		
24	SEABRON ADAMSON		
	Page 143		